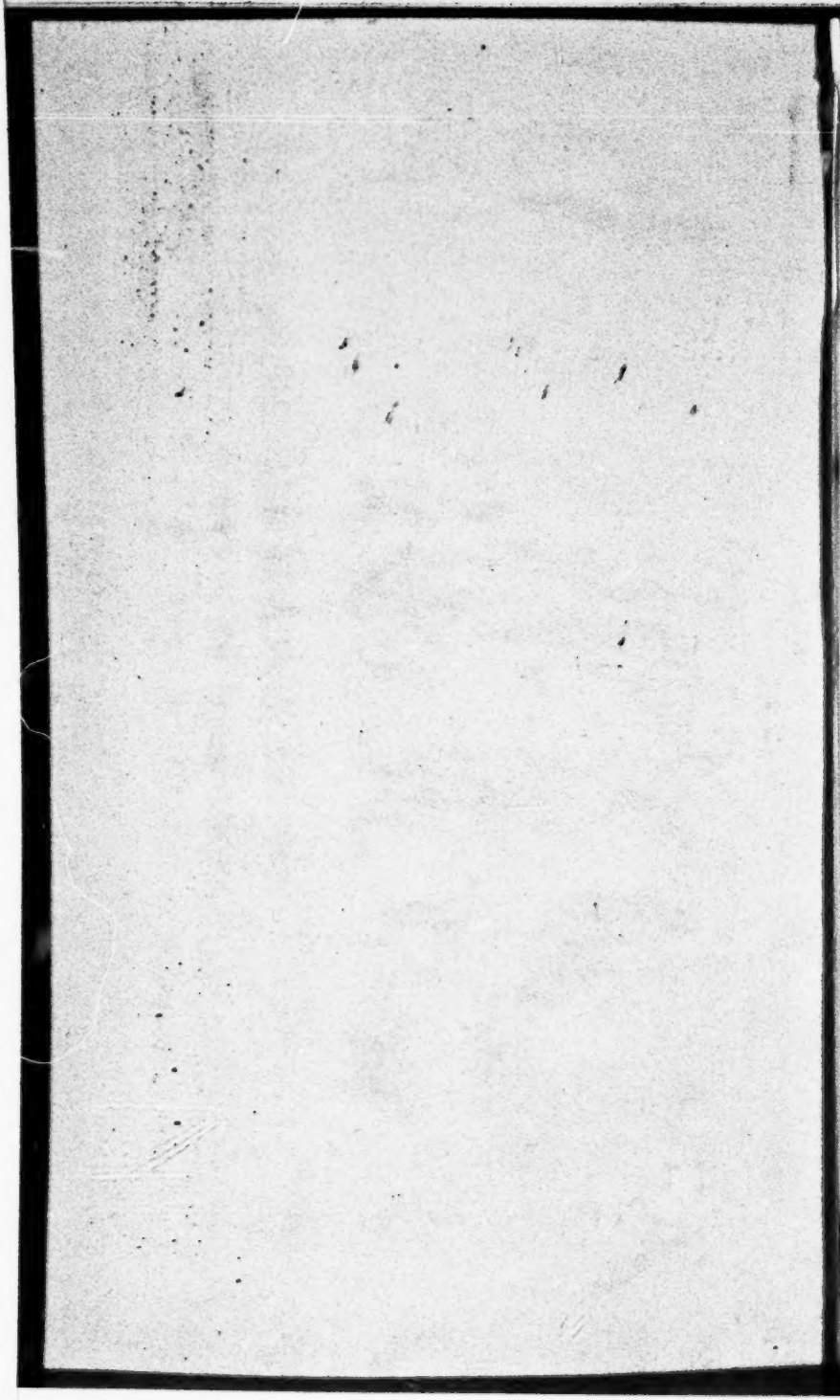

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-350

FRANK G. WATSON, Petitioner,

vs.

NEVADA NATIONAL BANK, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

CLARK J. GUILD, JR.
Counsel for Respondent
102 Roff Way
Reno, Nevada

tember 20, 1973

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OPINIONS BELOW

The opinions below, not yet reported, are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether a District Court may, after expiration of the initial thirty (30) day appeal period, extend the appeal period for excusable neglect to include an additional thirty (30) days upon ex parte application, without notice or hearing.

STATUTE INVOLVED

Federal Rules of Appellate Procedure 4(a):

"Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; . . .

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed bythis subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

STATEMENT OF THE CASE

Petitioner WATSON sought and obtained a permanent injunction against Respondent NEVADA NATIONAL BANK'S attempted foreclosure upon Watson owned land in California. After entry of judgment denying WATSON damages and attorneys' fees, WATSON filed motions under F.R.Civ. P. 50(b), 52(b) and 59 seeking directed verdicts, judgment notwithstanding verdict, amendment of findings and new trial, all of which motions were

denied in open court following a hearing thereon on December 18, 1972. Written entry of said denials was made on December 20, 1972, although no notice of entry of judgment was made to WATSON'S then attorney.

On or about February 13, 1973, WATSON filed an ex parte Application for Extension of Time to File Notice of Appeal, pursuant to which, without notice to Appellee NEVADA NATIONAL BANK and without hearing, the District Court, on February 15, 1973, ordered that "the time within which to file the Notice of Appeal under Rule 4, Federal Rules of Appellate Procedure, is extended to and including February 14, 1973."

On February 15, 1973, Petitioner WATSON filed his Notice of Appeal.

On or about March 19, 1973, Respondent served and filed its Motion to Dismiss Appeal grounded on the two-fold basis that "the request and application for an extension of time in which to file an appeal was made after the appeal period had expired without motion and notice and is therefore void and of no effect; and

that even if the extension and ex parte Order dated February 15, 1973, of the above noted Court is valid, the appellant did not file his Notice of Appeal on or before February 14, 1973, as required by said Order."

Pursuant to Respondent's Motion, the United States Court of Appeals for the Ninth Circuit on April 9, 1973, entered its order stating: "The appeal is dismissed." (Appendix 1 to the Petition.)

Thereafter, Petitioner filed a Petition for Rehearing which was denied on May 25, 1973, per order of the Court of Appeals appearing as Appendix 2 to the Petition.

ARGUMENT

The Petitioner has misconstrued the decision of the Court of Appeals in the instant case and in North Umberland Mining Co. v. Standard Acc. Ins. Co., 193 F.2d 951 (9th Cir. 1952) and in so doing attempts to mislead the Court in believing that the "court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter." Supreme Court Rule 19 (1) (b).

I.

THE DECISION BELOW IS CLEARLY CORRECT.

In North Umberland Mining Co. v. Standard Acc. Ins. Co. 193 F.2d 951 (9th Cir. 1952), the appellant during the second "excusable neglect" period made without notice to appellee its application for extension of time to file its appeal, which application the court granted ex parte. In dismissing the appeal, the Court of Appeals held:

> "Had the request for enlargement of the time been made before the expiration of (the initial 30 day) period, the court would have been empowered to order the enlargement 'with or without motion or notice.' But since it was made after expiration of the period, that is to say at a time when the movant was already in default, the court was without authority to act ex parte; it might proceed only upon motion and after notice of hearing served on the party or parties affected.
>
> * * *
>
> This case, in respect of the facts bearing on the claim of excusable neglect, affords an excellent illustration of the wisdom of empowering the court to act in such a matter only after notice and opportunity given the opposite party to be heard.
>
> In sum, we conclude that the court is without authority to extend the time for appeal except upon compliance with the rules governing the subject. The extension order here granted ex parte was void ab initio, and the appeal is accordingly dismissed."

Present F.R.App. P. 4(a) requires for an extension based on excusable neglect a motion with such notice as "the court shall deem appropriate." The lower court, consistent with North Umberland, supra, and F.R.App. P. 4(a), held that the appeal would be dismissed where the District Court acted ex parte.

This view was approved in Way v. Gaffney, 434 F.2d 997 (10th Cir. 1971) and in the cited cases appearing in the court's opinion (434 F.2d at 998):

> "Where a motion for an extension of time in which to appeal is not made within the initial thirty (30) days allowed by Rule 4(a), F.R.App. P., the trial court is without power to act without giving notice to all adverse parties. Cohen v. Plateau Natural Gas Co., 303 F.2d 273 (10th Cir. 1962), cert. denied, 371 U.S. 825, 83 S.Ct. 45, 9 L.Ed.2d 64; Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275 (3d Cir. 1962); Northumberland Mining Co. v. Standard Accident Insurance Co., 193 F.2d 951 (9th Cir. 1952); notes of the Advisory Committee on Rule 4(a), F.R. App. P."

II.

THERE IS NO CONFLICT OF DECISION.

Petitioner asserts that North Umberland, supra, stands for the proposition that "an extension must be both sought and granted within the original

and one-half page opinion in North Umberland reveals that the court used the language "without notice", "after notice" and "ex parte" eight times, or in every paragraph but one, and yet the holding of the court that "the extension order here granted ex parte was void ab initio" is not even alluded to by Petitioner, all of which indicates a misunderstanding by Petitioner of his starting point.

The only case cited by Petitioner giving color to his "conflicts" argument is Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084 (3d Cir. 1972) where the notice of appeal was filed within the second 30 day period without court approval, and where no motion for extension had been filed. The court stated (456 F.2d at 1087): "We hold, therefore, that if, as here, a notice of appeal is filed more than thirty but less than sixty days after the entry of the judgment appealed from the district court may at any time consider a motion to validate the filing within the second thirty days for excusable neglect." Later the court specifically acknowledged the right of appellee to be heard in opposition to show any possible prejudice.

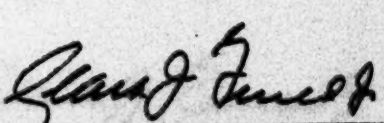
The rule that the hearing may be had after the sixtieth day was also approved in C-Thru Products, Inc. v. Uniflex, Inc., 397 F.2d 952 (2nd Cir. 1968), Reed v. People of State of Michigan, 398 F.2d 800 (6th Cir. 1968) and Evans v. Jones, 366 F.2d 772 (4th Cir. 1966).

It is clear that none of those decisions however are in conflict with North Umberland or the decision below as they relate to a different matter.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 73, three copies of the Brief in Opposition were mailed, stage prepaid, to Jerrold M. Ladar, Esq., 507 Polk eet, Suite 310, San Francisco, California, Counsel Petitioner. I further certify that all parties required e served have been served.

Clark J. Guild Jr.

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